IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

STEWART PARNELL,	:	
	:	
Petitioner,	:	**Criminal Case No.**
	:	1 : 13-CR-12-001 (WLS)
	:	
VS.	:	**28 U.S.C. § 2255 Case No.**
	:	1 : 19-CV-153 (WLS)
	:	
UNITED STATES OF AMERICA,	:	
	:	
	:	
Respondent.	:	

RECOMMENDATION

Petitioner's Motion to Vacate, Set Aside, or Correct his Sentence pursuant to 28 U.S.C. § 2255, filed on September 6, 2019 (Doc. 667), is before this Court for the issuance of a recommendation of disposition pursuant to the Rules Governing Section 2255 Proceedings for the United States District Courts. Petitioner is represented by retained counsel.

Procedural History

Petitioner was charged by means of an Indictment filed on February 15, 2013 with Conspiracy, Introduction of Adulterated Food into Interstate Commerce with intent to defraud or mislead, Introduction of Misbranded Food into Interstate Commerce with intent to defraud or mislead, Mail Fraud, Wire Fraud, and Obstruction of Justice. (Doc. 1). Three (3)

other Defendants were also charged in the Indictment. *Id.* Petitioner was represented at trial by retained counsel Tom Bondurant, Scott Austin, Justin Lugar, and Kenneth Hodges.

Following a thirty-four (34) day jury trial in July, August and September 2014, Petitioner was found guilty of Conspiracy to Commit Mail Fraud and Wire Fraud, Conspiracy to Introduce Adulterated and Misbranded Food into Interstate Commerce, multiple counts of Introduction of Adulterated Food into Interstate Commerce, multiple counts of Introduction of Misbranded Food into Interstate Commerce, multiple counts of Mail Fraud, multiple counts of Wire Fraud, and two (2) counts of Obstruction of Justice. (Doc. 285).

Petitioner filed a post-trial Motion for New Trial on October 6, 2014, alleging that juror misconduct prejudiced his right to a fair trial. (Doc. 308). In part, Petitioner alleged that jury members discussed salmonella-related deaths allegedly caused by Petitioner's company, and that Juror 34 showed juror bias. *Id.* The Court held two (2) hearings, calling in every selected juror for individual questioning at the second hearing. (Doc. 397). One juror testified that other jurors had conducted their own research over the course of the trial and discovered that the Defendants "killed nine people". *Id.* at p. 14. This juror did not bring this alleged misconduct to the attention of any Defendant or Defendants' counsel until after the trial had concluded. *Id.* After a detailed review of juror testimony, the Court found that "[v]iewing the totality of the circumstances, the Court finds that there is no indication that any juror concealed harbored bias from the Court or the Defendants. . . [and] the Court finds that the

Defendants failed to demonstrate that any juror failed to honestly answer any question during voir dire." *Id.* at p. 20.

In regard to whether the jury was exposed to prejudicial extrinsic information, the Court found that three (3) jurors stated that deaths were discussed in the jury room, but that "the discussion of deaths arose from a misperception or incorrect recollection of the trial testimony or evidence [that deaths were caused], not from extrinsic source." *Id.* at p. 21. The Court denied Defendants' Motion for New Trial. *Id.* at p. 25.

Petitioner was sentenced on September 21, 2015 to 336 months imprisonment followed by three (3) years of supervised release. (Docs. 488, 498). The judgment was amended by Order dated April 6, 2016 to reflect that Defendants were not ordered to pay restitution. (Docs. 619, 620).

Petitioner appealed his conviction. *United States v. Parnell, et al.,* 723 F. A'ppx 745 (11th Cir. 2018); (Doc. 528). On appeal, Petitioner again argued that he was entitled to a new trial based on the jury's alleged exposure to extrinsic evidence that people died as a result of the salmonella outbreak, that the district court erred in allowing testimony from former operating managers as to business records, and that the government's evidence of loss was not sufficiently specific or reliable. (Doc. 640). The Eleventh Circuit assumed that "at least several of the jurors who sat on the case were exposed to extrinsic evidence", but that the extrinsic evidence did not influence or contribute to the jury verdict. *Id.* The Eleventh Circuit further found that the former operating managers had ample knowledge from which to testify and that there was no error in admitting this testimony, and that any remand for recalculation

of the loss amount was futile and any errors in the district court's calculation were harmless. *Id.* Petitioner's 28 U.S.C. § 2255 Motion to Vacate and Motion for Evidentiary Hearing were filed with the Court on September 6, 2019. (Docs. 667, 668).

In his § 2255 motion, Petitioner sets out two (2) grounds for relief, raising the following ineffective assistance of counsel claims pertaining to his retained trial representation:

1. Counsel provided ineffective assistance in failing to seek a change of venue due to adverse pretrial publicity, jurors' preconceived notions, and the amount of media exposure throughout the entire division of this Court.

2. Counsel provided ineffective assistance in failing to move to strike for cause jurors with knowledge of the allegations of death caused by the salmonella outbreak.

Legal Standards

Section 2255 provides that:

> a prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> 28 U.S.C. § 2255.

If a prisoner's § 2255 claim is found to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.*

In order to establish that his counsel's representation was constitutionally defective, the Petitioner must show (1) that his counsel's representation was deficient, and (2) that the Petitioner was prejudiced by his counsel's alleged deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith v. Wainwright*, 777 F.2d 609, 615 (11th Cir. 1985).

"Our role in collaterally reviewing [] judicial proceedings is not to point out counsel's errors, but only to determine whether counsel's performance in a given proceeding was so beneath prevailing professional norms that the attorney was not performing as 'counsel' guaranteed by the sixth amendment." *Bertolotti v. Dugger*, 883 F.2d 1503, 1510 (11th Cir. 1989).

The *Strickland* court stated that "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

> [A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. . . . *It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . [rather][t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.* . . . In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

Strickland, 466 U.S. at 693-694, *emphasis added*.

In evaluating whether Petitioner has established a reasonable probability that the outcome would have been different absent counsel's alleged errors, a court "must consider the totality of the evidence before the judge or jury." *Brownlee v. Haley*, 306 F.3d 1043, 1060 (11th Cir. 2002).

"As to counsel's performance, 'the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'" *Reed v. Sec'y. Fla. Dep't. of Corr.*, 593 F.3d 1217, 1240 (11th Cir. 2010) (quoting *Bobby v.Van Hook*, 130 S.Ct. 13, 17 (2009)). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). In order to find that counsel's performance was objectively unreasonable, the performance must be such that no competent counsel would have taken the action at issue. *Hall v. Thomas*, 611 F.3d 1259, 1290 (11th Cir. 2010). "The burden of persuasion is on a petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable." *Chandler v. U.S.,* 218 F.3d 1305, 1313 (11th Cir. 2000).

Evidentiary Hearing

Petitioner filed a Motion for Evidentiary Hearing with his Motion to Vacate. (Doc. 668). Petitioner bore the burden of establishing that an evidentiary hearing is needed to dispose of his § 2255 motion. *Birt v. Montgomery*, 725 F.2d 587, 591 (11th Cir. 1984). "A

federal habeas corpus petitioner is entitled to an evidentiary hearing if he alleges facts which, if proven, would entitle him to relief." *Futch v. Dugger*, 874 F.2d 1483,1485 (11th Cir. 1989).

The Court found that the record did not conclusively show that Petitioner's claims fail, and that Petitioner was entitled to an evidentiary hearing on his claims. (Doc. 704). The Court held an evidentiary hearing on May 24 and 25, 2021. (Docs. 777-78). Both parties have filed post-hearing briefs in support of their positions. (Docs. 785, 790).

Facts

The Eleventh Circuit found that

> Defendant-Appellant Stewart Parnell is the former president of the Peanut Corporation of America ("PCA"). . . Until 2009 PCA made and sold peanut products to food producers across the United States. In 2009, federal authorities identified PCA's production plant in Blakely, Georgia as the source of a nationwide salmonella outbreak. . . Following a four year investigation, Appellant[] [and his co-defendants] were indicted for their conduct regarding food safety at PCA and during the FDA's investigation.
>
> During a seven-week jury trial, the Government presented evidence that Stewart and [his brother] Michael conspired with senior management at PCA to defraud its customers regarding the safety of its products. . . At Stewart's direction, PCA retested product that tested positive for salmonella until it obtained a negative result, shipped product before receiving the test results for the product, and even shipped product after receiving confirmed positive test results.
>
> The Government also presented evidence regarding a scheme that Stewart, Michael, and other senior management designed to help PCA meet production demands for the Kellogg's account. Specifically, in September 2007, PCA began assigning future lot numbers to samples of peanut paste that it sent for testing. It used those test results to create [Certificates of Analysis] for new lots of peanut paste that it shipped to Kellogg's. Thus

> beginning in September 2007, the COAs for Kellogg's orders contained test results for a sample pulled from a previous lot. The lot being shipped had not been tested. PCA took samples from the new lot, assigned future lot numbers to those samples, and sent them for testing to keep the practice going. PCA did not inform Kellogg's if test results for a lot that had already been shipped came back positive. Eventually, PCA assigned multiple future lot numbers to product from the same lot in order to decrease the number of lots that it tested. Between January 2008 and January 2009, more than 60% of paste lots for Kellogg's did not undergo any microbiological testing.
>
> All Appellants knew that PCA had received positive salmonella test results before the salmonella outbreak. But they were not forthcoming with the FDA during its investigation.
>
> . . .
>
> The jury found Stewart and Michael guilty of several counts of fraudulently introducing misbranded food into interstate commerce, interstate shipment and wire fraud, and conspiring to commit these offenses. The jury also found Stewart guilty of fraudulently introducing adulterated food into interstate commerce. The jury found Stewart [] guilty of obstruction of justice.

(Doc. 640, pp. 2-4).

I. Ineffective assistance: change of venue

In Ground 1 of his Motion to Vacate, Petitioner Stewart Parnell alleges that he received ineffective assistance of trial counsel in that counsel failed to seek a change in venue based on adverse pretrial publicity, jurors' preconceived notions, and the amount of media exposure for the case in the entire division, presumably the Albany Division of the Middle District of Georgia.

Testimony at the evidentiary hearing

In support of his Motion to Vacate, Petitioner called as witnesses each of the four (4) attorneys who were retained to represent him on his criminal charges, in addition to a peanut industry broker.[1] The government called lead counsel for co-Defendant Michael Parnell as a witness.

Then-attorney Kenneth Hodges[2] was hired by Petitioner Stewart Parnell to serve as local counsel in his criminal proceedings. (Doc. 777, p. 8). At the time of the evidentiary hearing, attorney Hodges had more than thirty (30) years of experience as an attorney. *Id.* at p. 7. Attorney Hodges testified that his role in representing Petitioner was limiting to picking the jury, "doing voir dire", and handling a few witnesses. *Id.* at pp. 9-10. Attorney Hodges stated that he was not part of the discussions about venue held among counsel for Petitioner. *Id.* at p. 12. The discussions attorney Hodges remembers taking place involved moving the trial to Virginia, but he recalled counsel either decided not to file a motion to change venue or it was filed and ruled on. *Id.* at p. 13. Attorney Hodges later testified that no motion to change venue was ever filed with the Court, although he was "sure we probably discussed it". *Id.* Attorney Hodges testified to his belief that the revelations of the jury inquiry showed that the trial should have been moved, and that the correct thing to have done, in retrospect, was to move for a change of venue. *Id.* at pp. 14, 19-20.

[1] To the extent that the Court agreed to take judicial notice of Attorney Devin Smith's testimony, given in Michael Parnell's § 2255 evidentiary hearing, the Court notes that Ms. Smith did not testify to anything other than general knowledge regarding the limited subject matter of a jury panel member exhibiting hostility and driving around the courthouse. (*Michael Parnell v. U.S.,* No. 1:13-CR-12-002 (M.D.Ga.), Doc. 776, pp. 27-28).

[2] At the time of Petitioner's trial, Kenneth Hodges was a practicing attorney. Subsequent to trial, Attorney Hodges was elected to the Georgia Court of Appeals.

Attorney Thomas Bondurant served as lead counsel for Petitioner. *Id.* at p. 69. Attorney Bondurant testified to over forty (40) years of legal experience, twenty-nine (29) of those as an attorney in the U.S. Attorney's office. *Id.* at pp. 67-68. Attorney Bondurant testified that from the outset of his representation of Petitioner, he was aware that the situation at PCA had "garnered a lot of media attention". *Id.* He read a significant amount of the news coverage concerning Petitioner and PCA, both before and during his representation of Petitioner, but stated that it "died off for several years, then [] picked back up when the trial was set." *Id.* at pp. 80-81. Attorney Bondurant admitted that he made "no specific effort . . . to monitor the local media", but he and his staff monitored the media coverage in general, which was "mostly" unfavorable to Petitioner. *Id.* at pp. 85-87. Attorney Bondurant acknowledged that he referenced "wide reporting" of the case in congressional hearings and the news media in a motion in limine filed with the Court. *Id.* at p. 88.

As to venue, attorney Bondurant testified that counsel discussed seeking a change of venue as a "constant topic of conversation" and researched the issue. *Id.* at p. 121. He stated:

> There were several discussions with Stewart present with the other lawyers and basically what we thought about change of venue was this. I understood from Ken Hodges and Ed Tolley that if there was a change of venue in Georgia it'd probably end up in Atlanta in a suburban area somewhere. Like I said, I thought we had a good shot of keeping out the falsified certificates and regardless of whether they were in or not, a huge part of the case was the unsanitary conditions at the plant. No matter what we did there was going to be evidence of mice running around in the peanuts and various other vermin . . . And I figured if we were in suburbia in Atlanta and a parent heard that they would immediately react very adversely, where Stewart told me and the fellow that Ken introduced me told me, it's pretty well-known that there's unsanitary conditions and mice are a problem in peanut plants in South Georgia and we

> felt that the people in Albany would recognize that and not hold that against him so much as somebody in Atlanta might . . .
>
> And also part of the thinking was there, too, was we were trying to present a defense of overreach that, you know, the fact that mice were running around in peanut plants was nothing new, the government knew about it, the inspectors knew about and they didn't do anything until there was like headlines and then they reacted to it, and I found in my experience a defense argument like that plays better in a rural area than a suburban or urban area from my own experience trying cases down in Coalfield to Southwest Virginia as opposed to trying them in Roanoke, and so that also factored into it.

Id. at pp. 123-124.

Attorney Bondurant testified that attorneys for all four (4) co-Defendants were in agreement with the theory to keep the trial in Albany for the foregoing reasons, also relying on local knowledge and experience of counsel. *Id.* at pp. 127, 128. Attorney Bondurant stated that conclusions about venue were informed by his trial strategy and were based on his experience and research into the area and people. *Id.* at pp. 156-157. Other venues were considered by Attorney Bondurant and co-counsel, and he was aware of the "almost impossible" standard to have venue changed. *Id.* at pp. 160-161.

Attorney Scott Austin also served as counsel for Petitioner at trial. At the time of the evidentiary hearing, Attorney Austin had approximately twenty-four (24) years of experience as an attorney. *Id.* at p. 188. Attorney Austin testified at the §2255 hearing that Petitioner's counsel monitored media coverage beginning with the initial peanut butter recall up to and through the trial, which included local and national coverage, and was largely unfavorable to Petitioner. *Id.* at pp. 197-199. In preparation for trial, Attorney Austin and co-counsel for

Petitioner traveled to the Albany Division, interviewed various people and witnesses, and interacted with various people within the peanut industry. *Id.* at pp. 213-215.

Attorney Austin testified to having researched change of venue for the case, including media coverage, which he characterized as "sporadic", and any resulting possible prejudice. *Id.* at p. 226-227, 230. Attorney Austin did not recall whether his research was reduced to memo form. *Id.* at p. 230. Attorney Austin reiterated counsel's strategy and regular discussions regarding relying on "blam[ing] the FDA" and the idea that people in the area with an understanding of rural agriculture would best serve Petitioner's interests at trial. *Id.* at pp. 231-232, 267, 270. Attorney Austin and co-counsel believed Petitioner could receive a fair trial in the Albany Division, did not think the media coverage rose to the level of preventing a fair trial there, and made a "deliberate strategic decision not to make a motion to change venue". *Id.* at pp. 268, 272-274.

Attorney Justin Lugar was the final member of Petitioner's trial team to testify at the § 2255 hearing. At the time of the evidentiary hearing, Attorney Lugar testified to attorney practice experience of approximately thirteen (13) years. (Doc. 778, p. 4). Attorney Lugar confirmed that counsel discussed seeking to have venue changed, including the downsides to potential alternative venues. *Id.* at pp. 27-28, 98. Attorney Lugar testified that "we had other issues that were more important like keeping illness and death out, discovery issues, . . . [s]o the focus was really more of we didn't think it was going to be granted so why – why pick a fight that you can't win." *Id.* at p. 29. Attorney Lugar characterized any potential motion to change venue as "not frivolous" but was a motion that would have been unsuccessful. *Id.* at

p. 31. Although the case garnered media attention, Attorney Lugar was surprised "how quickly [the press] seemed to lose interest" after the trial started. *Id.* at p. 108. Attorney Lugar reiterated co-counsel's testimony that the decision not to pursue a motion to change venue was a deliberate, strategic choice. *Id.* at p. 115.

James Strother, a peanut broker from Albany, Georgia, was Petitioner's final witness at the § 2255 hearing. Mr. Strother testified to Petitioner being one of his major customers between 2007 and 2009, and that the 2009 salmonella outbreak devastated the peanut industry. *Id.* at pp. 202-204. Strother testified to having spoken with approximately twenty (20) people in the area regarding their feelings about the outbreak and Petitioner's trial, which included feeling "under attack" by the media and feelings of hostility towards Petitioner. *Id.* at pp. 210-211, 224.

The government called Attorney Ed Tolley as a witness, who represented Petitioner's co-Defendant and brother Michael Parnell at trial, to testify at the § 2255 hearing. Attorney Tolley testified to having over forty-five (45) years of legal experience, with a significant number of those spent as a criminal defense attorney. *Id.* at p. 235. Attorney Tolley testified that "we weren't anywhere near the standard for changing venue out of the Middle District of Georgia, Albany Division. I just didn't – I didn't see it, I still don't see it." *Id.* at p. 243. Based on his forty-five (45) years of experience as a lawyer, Attorney Tolley testified that the circumstances in Petitioner's trial did not satisfy the standard for changing venue set out in *Skilling v. U.S.,* 531 U.S. 358, 378 (2010). Attorney Tolley stated that the "cooling off period, . . . the judge's efforts to secure a jury that was fair and impartial, . . . our efforts to do

the same thing, and then eventually you had a strike list" all provided layers of protection against prejudice to Petitioner. *Id.* at pp. 246-247. At the time of the trial, Attorney Tolley perceived the media attention to be "so, so", "really not much", and "rather mild", and the jury to be "pretty well-disciplined", although one member of the jury panel, who did not sit on the jury, exhibited hostility prior to trial. *Id.* at pp. 250-253, 277. Attorney Tolley testified that

> [y]ou don't just move a case when you decide you want to move a case. The government has a right to its choice of venue. The public has a right to the venue where the crime was committed, and the defendant has a right to be tried in the – in that venue if they choose to. But in terms of just saying we want to move the case, judge, because we're not comfortable here, that's just not it, that's not the test. . . I did not see that there was a good faith basis to try to change the venue.
>
> It is my belief that if I had filed a motion for change of venue, which I did not think was justified and I did not do and I would not have done, that what Judge Sands would have done is do exactly what we did here, and that is do a carefully crafted voir dire that follows the template in *Skilling* . . . and I don't think it would have made any difference . . .

Id. at pp. 284-285, 286, 290.

Evidence introduced and referenced by Petitioner

Petitioner referenced various newspaper and internet articles in the brief supporting his Motion to Vacate. [3] Specifically, Petitioner referenced and set out portions of media coverage

[3] The Court notes that Petitioner has provided only excerpts of media coverage in support of his § 2255 Motion, which do not reflect any mention of Petitioner by name. The government has provided the Court with the full text of certain parts of the media coverage referenced by Petitioner, wherein Petitioner is mentioned by name in only two (2) of the articles. (Doc. 689-1).

of events leading up to the trial on National Public Radio on January 26 and February 10, 2009, one article from the Albany Herald published on March 21, 2010, and articles published in the Blakely, Georgia newspaper over the course of five (5) days in February 2009 and on July 30, 2014. (Doc. 667-1, pp. 4-12).[4] These articles discussed the salmonella outbreak, the investigation of the outbreak that led to the closure of PCA plants in Blakely and elsewhere, and the effects of these events on Blakely and the surrounding communities. *Id.*

At the evidentiary hearing, Petitioner introduced into evidence multiple exhibits in support of his § 2255 Motion. Specifically, Petitioner introduced fee entries and invoices from Petitioner's trial counsel, emails from and between Petitioner's counsel, Attorneys Lugar and Austin's Notes on the Master Jury List, and Attorneys Austin and Bondurant's webpages. (Docs. 765-1 – 765-15). Included in these exhibits is a 2013 email sent to Attorney Bondurant and one of his partners referencing various articles in the media regarding the salmonella outbreak and the case against Petitioner and his co-Defendants. (Doc. 765-6). Several of the referenced articles were published in national newspapers, two (2) articles appeared in Virginia media outlets, one (1) article appeared in a Georgia newspaper, and one (1) article appeared in a Florida newspaper. *Id.* [5]

[4] Additionally, in his post-hearing brief, Petitioner references an article published by the Albany Herald, but he does not provide a date for this article. (Doc. 785, p. 12).

[5] The Court notes that Petitioner also attached to his reply brief, filed in reply to the government's response to the original Petition, a list of media coverage from across the country that purportedly addressed issues including some aspect of the salmonella outbreak, Petitioner's trial, the effect of the outbreak on the peanut industry, food safety, peanut farming, or product recalls. (Doc. 701-1).

In order to prove ineffective assistance of counsel based upon a failure to move for a change of venue, a petitioner must show, "at a minimum, [that] there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if counsel had presented such a motion to the court." *Chandler v. McDonough,* 471 F.3d 1360, 1362 (11th Cir. 2006).

The Sixth Amendment guarantees a criminal defendant the right to trial by an impartial jury, and to have said trial take place in the state and district where the crimes were committed. U.S. CONST. amend. VI. Transfer of a criminal trial to another venue is possible at a defendant's request "if extraordinary local prejudice will prevent a fair trial – a basic requirement of due process." *Skilling,* 531 U.S. at 378. Rule 21 (a) of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Fed. R. Crim. P. 21.

"A defendant is entitled to a change of venue if he can demonstrate either 'actual prejudice' or 'presumed prejudice'". *Meeks v. Moore,* 216 F.3d 951, 961 (11th Cir. 2000). Petitioner urges the Court to find that a presumption of prejudice controls this case, based on pretrial publicity and pervasive hostility toward PCA.

Presumption of prejudice

"Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community

where the trials were held." *Coleman v. Kemp,* 778 F.2d 1487, 1490 (11th Cir. 1985). However, "[p]rominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*. A presumption of prejudice, our decisions indicate, attends only the extreme case." *Skilling,* 531 U.S. at 381.

As set out in *Skilling*, the Court's determination of whether prejudice is presumed to exist is guided by consideration of certain factors, including (1) the size and characteristics of the community in which the crime occurred; (2) whether news stories about the allegations in the indictment contained blatantly prejudicial information of the type readers or viewers "could not reasonably be expected to shut from sight"; (3) whether the level of media attention diminished preceding the trial; and (4) whether the verdict undermined the supposition of juror bias. *Id.*

Although as Petitioner points out the population of Blakely, Georgia during the time period in question was approximately 5,000 people, Court records show that the jury pool from which jurors were selected in the Albany Division of the Middle District of Georgia was over 8,000 in number. The Albany Division encompasses eighteen (18) counties. Although Blakely itself is a "small farming town", the population of the division from which the jury was taken was much larger and contains areas considered to be more urban in comparison, with a population reported by Petitioner to be over 340,000. (Doc. 785, p. 14, citing https://www.georgia-demographics.com/counties_by_population).

As in *Skilling*, none of the excerpts from news stories provided by Petitioner in his initial brief contain a confession from Petitioner, and none of the excerpts presented by Petitioner specifically mention Petitioner, or any of his co-Defendants, by name. None of the

excerpts contain inflammatory information, such as details of horrific conditions or deaths. All of the excerpts contain largely factual recitations of the events at issue, the connection of the salmonella outbreak to PCA, and the impact of the outbreak and negative media attention on Blakely and the farming community. Although, as noted by Petitioner, some of the articles refer to deaths and "severe" effects on the community and farming sector, these references do not rise to the level of inflammatory and "blatantly prejudicial" information that would have required the Court to presume prejudice had a motion to change venue been filed. As in *Skilling*, "[n]o evidence of the smoking-gun variety invited prejudgment of [Petitioner's] culpability." *Id.* at 383.

The news coverage presented by Petitioner focused on the impact of the salmonella outbreak on the community of Blakely, both in terms of farming and the closing of PCA itself, and the unfolding investigation. As noted by the government, a good portion of the news coverage presented by Petitioner concerned negativity and blame directed towards the media itself and the government for their handling of the matter. *Cf. Sheppard v. Maxwell,* 384 U.S. 333, 354, 358 (1966) (pretrial media coverage consisted of "months [of] virulent publicity about Sheppard and the murder [of his pregnant wife]" and a "carnival atmosphere" pervaded the trial). Even though witnesses testified to the news coverage being largely unfavorable to Petitioner, "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." *Skilling,* 561 U.S. at 384, *quoting Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976).

Moreover, Petitioner's witnesses testified to diminished media coverage of the salmonella outbreak and Petitioner's trial during the five (5) years between the initial

outbreak events in 2009 and the trial in 2014. Petitioner did not show that media coverage either stayed the same or increased during the five (5) year interval.[6]

Although Petitioner was found guilty on all but one (1) count of the Indictment, the acquittal on one count shows some level of undermining of any "supposition of juror bias". *Skilling*, 561 U.S. at 383. In *Skilling*, the defendant was charged in thirty-five (35) counts and was acquitted on nine (9) of the counts. *See United States v. Skilling*, 554 F.3d 529, 542 (5th Cir. 2009), *vacated in part on other grounds by Skilling v. U.S.*, 561 U.S. 358 (2010). "The jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues and reinforces our belief and conclusion that the media coverage did not lead to the deprivation of [the] right to an impartial trial." *Skilling*, 561 U.S. at 384, *quoting United States v. Arzola-Amaya*, 867 F.2d 1504, 1514 (5th Cir. 1989).

Based on a consideration of the factors set forth in *Skilling*, the Court finds that no presumption of prejudice was present in this case. Petitioner has failed to show that sufficiently prejudicial pretrial publicity saturated the Middle District of Georgia, the community where the trial was held or the division from which the jury panel was pulled, such that prejudice would have been presumed by the trial court. *See Bundy v. Dugger,* 850 F.2d 1402 (11th Cir. 1988) (Defendant failed to establish presumed prejudice, as media coverage of prior trial was largely factual and not designed to inflame or prejudice the public,

[6] Although Petitioner attached a list of purported news coverage to his April 2020 reply brief (Doc. 701-1), he does not set out the substance of the articles themselves, only the headlines, and many of the articles do not appear to specifically discuss Petitioner, PCA, or the salmonella outbreak. Neither Petitioner nor the government address this list of media coverage in their post-hearing briefs. Other than to note the news coverage, Petitioner has not, in any meaningful level of detail, set out or relied on any specific portion of the media articles to support his argument regarding presumed prejudice. The Court considers this attachment as it is apparently presented, i.e., as a list of news coverage that to some degree, and in some cases very remotely, related to Petitioner's trial.

and defendant's well-publicized criminal record did not establish that the community was so predisposed to defendant's guilt as to establish presumed prejudice).

To the extent that Petitioner argues that jurors' preconceived notions about the case created a presumption of prejudice, he has not shown that such preconceived notions rose to the level of creating prejudice such that a Rule 21 motion to change venue would have been granted. The Court thoroughly questioned all potential jurors who stated they had some level of knowledge about the case, and established that those seated on the jury could remain impartial. Petitioner has not shown that jurors with connections to farming or the peanut industry in general established community prejudice that would have supported a change of venue under Rule 21. As in *Skilling*, voir dire was "well suited to [identifying and inspecting prospective jurors' connections], and the Court clearly and thoroughly examined the panel to uncover any potential bias. *Skilling*, 561 U.S. at 384. As noted below, Petitioner has not established actual prejudice on the basis of jurors' alleged bias.

Actual prejudice

The Court notes that Petitioner limits his argument regarding prejudice to the assertion that a presumption of prejudice existed in this case. Petitioner does not make any specific argument or showing regarding actual prejudice. Even if Petitioner had made this argument, the record does not contain evidence of actual prejudice. "To find the existence of actual prejudice, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. Second, these jurors, it must be determined, could not

have laid aside these preformed opinions and rendered a verdict based on the evidence presented in court." *Coleman v. Zant*, 708 F.2d 541, 544 (11th Cir. 1983).

In regard to a showing of actual prejudice that would have supported a motion to change venue, Petitioner has failed to show that any of the jurors chosen to decide the case believed Petitioner was guilty before hearing the evidence, and that these jurors could not have laid aside this belief, such that a motion to change venue would have been granted based on a finding of actual prejudice. Although Petitioner repeatedly points to the entry of extrinsic information regarding deaths related to the salmonella outbreak into jurors' considerations, knowledge of deaths alone does not mean jurors had decided Petitioner was guilty of the crimes charged before hearing the evidence. "Jurors . . . need not enter the box with empty heads in order to determine the facts impartially." *Skilling,* at 398.

Moreover, the Courts' voir dire of potential jurors was thorough and provided assurance of jurors' impartiality. *See Campa,* 459 F.3d at 1148 ("[T]he court's careful and thorough voir dire rebutted any presumption of prejudice.").Voir dire took place over a period of two (2) days, and was led by the Court, with follow-up questions from counsel. The Court specifically found after its post-trial hearings that "there is no indication that any juror concealed harbored bias from the Court or the Defendants . . . [and] the Court finds that the Defendants failed to demonstrate that any juror failed to honestly answer any question during voir dire." (Doc. 397, p. 20).

The Court notes that each of Petitioner's counsel testified to the decision regarding a motion to change venue being a matter of strategy, made after weighing and considering possible options and outcomes, primarily considering that their defense theories of

government overreach and inevitable evidence of conditions in the plant would play better with a jury from the region. Each of Petitioner's counsel also testified to his belief that the granting of such a motion was unlikely given the circumstances of the case. Each of Petitioner's counsel had a significant amount of legal experience, and the experience of counsel strengthens the presumption that counsel's decisions were reasonable. *Raheem v. GDCP,* 995 F.3d 895, 910 (11th Cir. 2021).

"To give trial counsel proper deference, this circuit presumes that trial counsel provided effective assistance. And it is the petitioner's burden to persuade us otherwise." *Harvey v. Warden, Union Correctional Institution*, 629 F.3d 1228, 1245 (11th Cir. 2011). "An attorney's actions are sound trial strategy, and thus effective, if a reasonable attorney could have taken the same actions." *Id.* at 1243.

Petitioner has not refuted the testimony from his counsel that the decision not to file a motion to change venue was sound trial strategy. Such strategic choices are "virtually unchallengeable". *Strickland*, 466 U.S. at 690. Even if, as two (2) of the four (4) counsel testified, they later deemed the decision to be incorrect, "the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983). Petitioner has clearly failed to satisfy this burden regarding counsel's strategic decision not to file a motion to change venue, and has failed to establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Considering the totality of the evidence before the jury, and as found by the Eleventh Circuit, "the evidence of guilt was overwhelming". (Doc. 640, p. 10).

At different points in the prosecution of his § 2255 Motion to Vacate, Petitioner has asserted that counsel failed to obtain the services of a jury consultant, and should have conducted a more thorough voir dire to uncover juror economic impact and relationship to the peanut industry. To the extent that these assertions are part of his ground challenging counsel's failure to file a motion to change venue, Petitioner has failed to establish that counsel's decisions regarding these issues were patently unreasonable such that no competent attorney would have made the same decision, or that there is a reasonable probability that the outcome of the trial would have been different absent the alleged errors.

II. Ineffective assistance: motion to strike jurors

In his second ground for relief, Petitioner asserts that his counsel provided ineffective assistance in failing to move to strike venirepersons who had heard about deaths attributed to the salmonella outbreak. Two (2) of these venirepersons were ultimately seated on the jury. Petitioner contends that counsel's decision not to move to have these jurors struck was not a strategic decision, but was based on their erroneous belief that the Court had removed all of the jurors with knowledge of deaths for cause.

In his post-hearing brief, Petitioner asserts that the fact that Attorneys Bondurant, Austin, and Lugar "actually conferred about whether to strike for cause jurors with knowledge of deaths, did a cost/benefit analysis, and decided it was better to keep them on the jury because of the benefits of their having knowledge of the peanut industry . . . [was] the opposite of effective representation of a criminal defendant." (Doc. 785, p. 17). Petitioner attempts to distinguish the decision making of Attorney Hodges, characterizing his process

as a "strategic decision" not to move to strike these jurors because it was not a motion the judge would have granted. Nonetheless, Petitioner argues that Attorney Hodges now sees this was error and admits trial counsel's ineffectiveness. *Id.* at p. 18. This attempt to distinguish counsel's performances is belied by the attorneys' testimony, which establishes that each of the four (4) attorneys representing Petitioner at trial believed the decision not to move to strike the identified jurors was a strategic decision.

To the extent that Petitioner challenges counsel's failure to file motions to strike venire-persons who were ultimately *not* seated on the jury, he has not identified any prejudice suffered as a result of counsel's alleged inadequate representation in this regard.

As part of the voir dire process, the Court asked the jury panel whether anyone had personal knowledge, defined as "your own direct knowledge about any of the matters in this case". (Doc. 554, p. 2). The Court, with counsel and Defendants present, then questioned jurors who claimed to have personal knowledge about the case in chambers, individually. Each juror was asked to describe his/her personal knowledge, the source of the knowledge, whether he/she had begun to form any opinion about the case or a defendant's guilt, and if so, whether he/she could set that aside. *Id.* at pp. 5-6. Counsel was allowed to ask follow-up questions. Certain jurors were excused for cause.

In regard to the two (2) jury members who stated they had some knowledge of death, one of these jurors stated during voir dire that he/she was told by a relative that the salmonella outbreak had "killed some people in Americus", but that he/she could base his/her opinion only on the evidence before him/her. *Id.* at pp. 46-47. No motion was made by

counsel for any of the Defendants to strike this juror. The second juror with knowledge of deaths stated he/she thought he/she had heard on television that somebody had died, but he/she had not formed any opinion regarding the case or Defendants' guilt and would be able to put aside the news story and decide the case on the evidence presented in the courtroom only. *Id.* at pp. 109-111. Attorney Hodges questioned one of the jurors further, but no motion was made by counsel to strike this juror.

Testimony at the evidentiary hearing

Voir dire was conducted by the Court, with counsel asking follow-up or additional questions. In regard to any motion to strike jurors, Attorney Hodges, who was primarily responsible for voir dire for Petitioner, testified at the § 2255 evidentiary hearing that not moving to strike jurors who had heard about deaths was a mistake, but that

> they responded that they could put aside anything that they knew outside of the courtroom and base their decision solely on the evidence, and we discussed whether or not we thought the judge would rule in our favor on the motion for cause, and we collectively decided that based on their responses about their willingness to judge the case only on the evidence that he would rule against us on that and we decided that it wasn't worth challenging something that we knew he was not going to grant.

(Doc. 777, pp. 21-22).

Attorney Hodges acknowledged that in regard to a motion to strike, he did not believe it would be granted by the Court, and testified that he had assured himself that the two (2) jurors with knowledge of deaths who sat on the jury said they could be fair and impartial. *Id.* at pp. 22, 26.

Attorney Hodges acknowledged that jury selection included many considerations and is not a science, and stated that counsel made a strategic decision not to move to strike jurors with knowledge of deaths related to the salmonella outbreak. (pp. 35-36, 48). Attorney Hodges stated that his opinion at the evidentiary hearing was "based on hindsight and things that have occurred after the fact." *Id.* at p. 52.

Thomas Bondurant testified that counsel was "operating under the principle that just the mere fact of hearing something in and of itself does not automatically disqualify you from a jury." *Id.* at p. 148. According to Attorney Bondurant, jury selection was a complex process and those chosen had sworn to be impartial, following questioning by counsel and by the Court. *Id.* at pp. 166-167, 169-170.

Scott Austin testified that Petitioner's motion in limine to exclude deaths from evidence and having a juror who had heard about deaths were "fundamentally different", in that a juror having heard of deaths was obligated not to consider deaths. *Id.* at pp. 243-244. "[I]f you were to make sort of a blanket statement and file a motion to say that anybody who had heard in any way, had any perceptions about deaths prior to the start of the trial should be struck for cause, then what you've done is you've eliminated the possibility to make individual distinctions among people and judge their demeanor and their character when you see them . . . " p. 274.

Justin Lugar testified to believing that jurors with knowledge of deaths should have been struck for cause, and that he did not know why a motion to strike was not made. (Doc.

778, p. 46). Attorney Lugar acknowledged that selection of jurors encompassed competing considerations and that "some of those jurors ticked other boxes for us". *Id.* at pp. 47, 118.

Ed Tolley testified that "one thing I do believe that [Judge Sands] did was very thoroughly vet this jury on the fact that they could be fair and impartial in rendering a verdict in this case." *Id.* at p. 247.

Petitioner has failed to establish that counsel's failure to move to strike jurors with knowledge of deaths related to the salmonella outbreak was an act that no competent counsel would have taken. *Chandler,* 218 F.3d at 1314. "[C]ounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken might be considered sound trial strategy". *Id.*

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.

Strickland, 466 U.S. at 689-690.

"Counsel is also accorded particular deference when conducting *voir dire*. An attorney's actions during *voir dire* are considered to be matters of trial strategy. A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." *Hughes*

v. U.S., 258 F.3d 453, 457 (11th Cir. 2001). The jurors in question did not in fact express any doubt as to their impartiality, and the Eleventh Circuit specifically found that it could not conclude "that the exposure of several jurors [during the trial] to the fact that several people also died from the outbreak was highly prejudicial". (Doc. 640, p. 9).

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. . . The affirmative of the issue [regarding the nature and strength of the opinion formed] is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside.

Irvin v. Dowd, 366 U.S. 717, 723 (1961).

Even if the identified jurors had expressed some doubt as to their abilities to be impartial, "[a] juror's express doubt as to her own impartiality on *voir dire* does not necessarily entail a finding of actual bias." *Hughes*, 258 F.3d at 458. Counsel's testimony establishes that the decision not to move to strike jurors with knowledge of deaths was a strategic decision, supported by a determination that the seated jurors testified to their abilities to be impartial.

To the extent that Petitioner asserts that counsel's failure to move to strike jurors with knowledge of related deaths resulted in prejudice to Petitioner by virtue of failing to preserve the issue for appeal, "when the claimed error of counsel occurred at the guilt stage of trial (instead of on appeal) we are to gauge prejudice against the outcome of the trial: whether

there is a reasonable probability of a different result at trial, not on appeal." *Purvis v. Crosby,* 451 F.3d 734, 739 (11th Cir. 2006). Despite much speculation and insinuation, Petitioner has not shown that he suffered prejudice as a result of counsel's decision not to move to strike jurors with knowledge of deaths, in that he has failed to show that absent this alleged error, there was a reasonable probability that the outcome of the trial would have been different.

To the extent that Petitioner asserts that counsel thought jurors with knowledge of deaths had been struck, the Court notes that Attorney Bondurant testified at the evidentiary hearing that his statement during voir dire that he thought all jurors with knowledge of deaths had been struck for cause was incorrect. (Doc. 777, pp. 143-145). Petitioner has not shown that this supposition actually motivated counsel's decision not to move to strike jurors with knowledge of deaths.

Structural error argument

In his initial brief, Petitioner characterizes both grounds for relief as counsel's failure to secure an impartial jury, and argues that the grounds represent structural errors that do not require a separate showing of prejudice. However, as noted by the government, Petitioner has failed to establish that the alleged errors of counsel actually resulted in a jury that was not impartial and that the structural error analysis is applicable to this case. In a case quoted by Petitioner in support of his structural error argument, the First Circuit specifically found that "[t]he presence of a juror *whose revealed biases* would require striking the juror for cause in a criminal case is a structural error". *United States v. French,* 904 F.3d 111, 1120 (1st Cir. 2019), *emphasis added*. Moreover, "[t]he Supreme Court instructed us in *Strickland* that

aside from . . . three exceptions – actual or constructive denial of counsel altogether, certain types of state interference with counsel's assistance, and conflicts of interest – prejudice must be shown". *Purvis*, 451 F.3d at 741-742 ("the law of this circuit [is] that an ineffective assistance of counsel claim based on the failure to object to a structural error at trial requires proof of prejudice".).

Conclusion

Petitioner has failed to establish by a preponderance of the evidence trial counsel's ineffective assistance. WHEREFORE, it is recommended that Petitioner Stewart Parnell's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 be **DENIED**. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. The District Judge shall make a de novo determination as to those portions of the Recommendation to which objection is made; all other portions of the Recommendation may be reviewed by the District Judge for clear error.

Objections

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences

on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

The undersigned finds no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, it is recommended that the Court deny a certificate of appealability in its Final Order. If the Petitioner files an objection to this Recommendation, he may include therein any arguments he wishes to make regarding a certificate of appealability.

SO RECOMMENDED, this 7th day of April, 2022.

s/ ***Thomas Q. Langstaff***

UNITED STATES MAGISTRATE JUDGE